

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CASEY FROESE

Claimant

VS.

TRAILERS & HITCHES, INC.

Respondent

AND

FIRSTCOMP INSURANCE COMPANY

Insurance Carrier

Docket No. 1,036,333

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 14, 2007, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Kevin T. Stamper, of Wichita, Kansas, appeared for claimant. Joseph R. Ebbert, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that it is medically necessary for claimant to have transportation and ordered respondent to purchase a motor vehicle for claimant and have it handicapped equipped.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 13, 2007, Preliminary Hearing and the exhibit, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the ALJ did not have jurisdiction to order it to provide claimant with a motor vehicle, since a motor vehicle is not covered in the definition of medical treatment as provided by the Kansas Workers Compensation Act. And there are no compensability issues in this claim. Respondent contends it is willing to provide claimant with transportation to medical appointments or, in the alternative, will modify a vehicle to make it handicap accessible for claimant. Further, respondent argues that claimant did not

offer any evidence that he is unable to get to medical appointments due to the lack of transportation.

Claimant asserts that his authorized treating physician has prescribed a vehicle equipped with handicapped-accessible controls, deeming it to be medically necessary. Claimant argues that a vehicle can, in some circumstances, constitute medical compensation. Claimant argues that his ability to obtain independent transportation is not a function of his personal convenience but is a requirement in his ability to assist in his own care and treatment. Accordingly, claimant requests the Board affirm the Order of the ALJ.

The issue for the Board's review is: Did the ALJ exceed his jurisdiction by ordering respondent to purchase a vehicle for claimant?

FINDINGS OF FACT

Claimant was injured on June 6, 2007, while working for respondent. As a result of his injuries, he is a paraplegic and is confined to a wheelchair. He continues to have medical treatment for his injuries. His physician at Craig Hospital has prescribed that a vehicle be handicapped modified for him, stating that such a vehicle was medically necessary. As respondent points out in its brief, the prescription is for modifications to be made to a vehicle, not for a vehicle itself.

To be installed in patient's pickup truck

- (1) Hand Control - MPS right-angle, mount Left (NO horn/dimmer)
Install and test device
- (2) Steering knob - MPS or MPD, mount at 1:00 or 2:00 position
- (3) Access unlimited Glide N' Go Transfer Assist Seat, Driver's location
- (4) Bruno Truckbed wheelchair loader - PUL - 1100 (outrider)¹

Claimant counters that the accident has rendered him unemployable; so he cannot afford to purchase a vehicle. Since the accident, claimant's parents have taken off work from their jobs to take him to his medical appointments. He acknowledges he could call for public transportation to take him to his appointments and that respondent would be liable to pay those bills. He has not had to call for public transportation to date as his parents have taken him to his appointments. However, an accommodated vehicle would substantially assist him in getting to his medical appointments.

Claimant acknowledges that he had a vehicle at the time of his accident. However, it was a standard transmission vehicle and he could no longer drive it. He also could not afford to make payments on the vehicle, so he sold it back before it was repossessed.

¹ P.H. Trans., Ex. 1.

PRINCIPLES OF LAW

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.² This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.³

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁴

K.S.A. 2006 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

In *Hedrick*,⁵ the Kansas Court of Appeals held: "Under the facts of this case, the Workers Compensation Board erred in concluding that claimant's costs in purchasing a larger car were medical treatment under K.S.A. 44-510(a)." The court, however, expressly limited its holding to the facts before it and suggested a different result was possible where the claimant was a paraplegic.

In closing, we note that this case does not involve a paraplegic claimant who seeks a specially equipped vehicle under the Workers Compensation Act. Among

² K.S.A. 2006 Supp. 44-551(i)(2)(A).

³ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, Syl. ¶ 3, 994 P.2d 641 (1999).

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁵ *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, Syl. ¶ 3, 935 P.2d 1083 (1997).

jurisdictions which have addressed that problem, there is a split of authority. The varying results depend to a large degree on the peculiar language found in the various states' workers compensation laws. See 2 Larson's Workmen's Compensation Law, § 61.13(a); 82 Am. Jur. 2d, Workers' Compensation § 394, p. 422. Those cases are helpful only to the extent they reinforce our statutory requirement that medical treatment be reasonably necessary.⁶

In discussing *Hedrick*, the Board has noted that "[o]bviously, the context in which the services are provided is significant to any determination of what constitutes medical treatment."⁷ The Board has, under certain circumstances, determined that such things as a hot tub⁸, a computer⁹, and a mattress¹⁰, constituted medical treatment. And the Court of Appeals has held that a custom-made brassiere is reasonable medical treatment.¹¹ Whereas in another case, the Board has denied the payment of utility bills.¹²

The problem with trying to separate what is a reasonable medical necessity from what is dictated by convenience and/or lifestyle is that these two categories can sometimes overlap. That is particularly true in this case because claimant's paraplegia renders difficult many daily activities that most people take for granted. Furthermore, the claimant's mental or emotional health is an important medical goal in and of itself and it can also be a significant part of an individual's physical health. Thus, the line between medical necessity and lifestyle becomes blurred and at times is nonexistent. Nevertheless, as the Assistant Director pointed out, citing *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997), respondent cannot reasonably be held responsible for all the expenses associated with the accommodations that claimant's disability may require. Some modifications, while easily justifiable as related to claimant's disability, may nonetheless be outside the coverage of the Workers Compensation Act. The Board cannot require respondent to provide more than what is provided for in the Act, even where the request addresses what could be considered a basic need.¹³

⁶ *Id.* at 788.

⁷ *Butler v. Jet T.V.*, No. 106,194, 2004 WL 1058372 (Kan. WCAB Apr. 16, 2004).

⁸ *Fernandez v. Safelite Auto Glass*, No. 244,854, 2002 WL 31828620 (Kan. WCAB Nov. 20, 2002).

⁹ *Fletcher v. Roberson Lumber Company*, No. 231,570, 1999 WL 195653 (Kan. WCAB Mar. 1999).

¹⁰ *Conner v. Devlin Partners, LLC*, No. 1,007,224, 2005 WL 831913 (Kan. WCAB Mar. 11, 2005); *Goodwin v. Southland Corporation d/b/a 7-Eleven Stores*, No. 216,691, 2000 WL 973229 (Kan. WCAB June 29, 2000).

¹¹ *Gorden v. IPB, Inc.*, Nos. 84,110 and 84,173, unpublished Court of Appeals decision filed October 27, 2000.

¹² *Bhattarai v. Taco Bell*, No. 261,986, 2002 WL 1838755 (Kan. WCAB July 26, 2002).

¹³ *Butler v. Jet TV*, No. 106,194, 1998 WL 229860 (Kan. WCAB Apr. 14, 1998).

The Board has held that while the costs of making a vehicle handicapped accessible can be medical treatment, the cost of the vehicle is not.

K.S.A. 44-510(a) (1981) requires respondent to provide transportation to and from medical treatment. It does not specify the method and respondent is free to determine the method of transportation. It does not require respondent to furnish claimant with a personal motor vehicle. Moreover, the Kansas Court of Appeals has held that a personal motor vehicle is not medical treatment under K.S.A. 44-510(a). In Hedrick v. U.S.D. No. 259, the Court of Appeals accepted an appeal from a preliminary hearing order in which the Administrative Law Judge had awarded claimant reimbursement for a portion of the cost of a vehicle. In that case, Ms. Hedrick had suffered a hip injury and the authorized treating physician recommended she obtain a larger vehicle, which would allow her easier access. Ms. Hedrick testified that, as a result of her injury, she was unable to get in and out of her present vehicle. The Appeals Board refused to review that preliminary order on an appeal from a preliminary hearing because it was not a final order and it did not raise one of the jurisdictional issues listed in K.S.A. 44-534a. In so finding, the Appeals Board determined that the order for the vehicle fell within the jurisdiction given the Administrative Law Judge to make orders concerning medical care at a preliminary hearing. The Court of Appeals disagreed and found the Administrative Law Judge had exceeded his jurisdiction in making the order because the motor vehicle did not constitute medical treatment or a medical apparatus under K.S.A. 44-510(a). In dicta, however, the Court added a proviso to the effect that its holding might be different had claimant's injury resulted in paraplegia. The Court did not explain this distinction. The Board now finds itself in the position where it must fashion an interpretation of that statute consistent with the holding in Hedrick. Accordingly, the Board finds that the van itself is not medical treatment or a medical apparatus, and, therefore, cannot be ordered paid by respondent. The costs associated with making the van handicapped accessible, however, do fit the definition of medical apparatus. Furthermore, respondent has agreed to furnish the wheelchair lift apparatus and other conversion costs if claimant provides the van. Given this concession by respondent, the Board makes this its order. Accordingly, the award entered by the Assistant Director with respect to the van is affirmed.¹⁴

Larson's Workers' Compensation Law states:

As to specially equipped automobiles for paraplegics, New York, North Carolina, and South Dakota have denied reimbursement, on the ground that an automobile is simply not a medical apparatus or device. Some states have held *contra*. Pennsylvania has approved installation of hand controls in claimant's automobile. The better rule is illustrated by a Michigan decision, which held that the

¹⁴ *Id.*; see also *Hayes v. R & S Services*, No. 1,023,460, 2006 WL 1933444 (Kan. WCAB June 30, 2006); *Bhattarai v. Taco Bell*, No. 261,986, 2003 WL 22401254 (Kan. WCAB Sept. 30, 2003), and *Davidson v. Meadowbrook Lodge Nursing Home*, No. 210,158, 2000 WL 973222 (Kan. WCAB June 29, 2000).

cost of modifying a van so that it can be operated by someone who is disabled may be a compensable medical expense under the state's workers' compensation law, but the cost of the van itself is not compensable. The statute in Maine is not limited to *medical* apparatus or devices, but more broadly includes reasonable and proper mechanical aids and physical aids made necessary by the injury.¹⁵

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁷

ANALYSIS AND CONCLUSION

What constitutes medical treatment in one case may not in another. In this case, respondent concedes that it is responsible for the cost of equipping a vehicle to make it handicap accessible such that claimant would be able to operate the vehicle. Furthermore, respondent contends that this is all that the physician's prescription requires. This Board Member agrees.

The Board has addressed this question before.¹⁸ Based on the record presented to date, claimant has failed to prove that a vehicle is medical treatment. The cost of equipping a vehicle to accommodate claimant's injuries, however, is medical treatment.

Because the record fails to prove that a motor vehicle is medical treatment or a medically necessary apparatus, the ALJ exceeded his jurisdiction in ordering respondent "to purchase a motor vehicle for the Claimant"¹⁹ The ALJ did not exceed his jurisdiction in ordering respondent to "have it handicapped equipped."²⁰

¹⁵ 5 Larson's Workers' Compensation Law, § 94.03[1] (2006).

¹⁶ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹⁷ K.S.A. 2006 Supp. 44-555c(k).

¹⁸ See *Hayes*, *supra* note 14; *Bhattarai*, *supra* note 14; *Davidson*, *supra* note 14; *Butler*, *supra* note 13.

¹⁹ ALJ Order (Dec. 14, 2007)

²⁰ *Id.*

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated December 14, 2007, is modified in part to reverse that portion of the order that requires respondent to purchase a motor vehicle for claimant, but this appeal is dismissed as to the remaining portion of the order that requires respondent to handicap equip a vehicle if one is provided by claimant.

IT IS SO ORDERED.

Dated this _____ day of February, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge